

ORDER UNDER APPEAL



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
17 STATE HOUSE STATION
AUGUSTA, ME 04333

DEPARTMENT ORDER

IN THE MATTER OF

MICHAEL E. TRAPHAGEN
DIANNE W. TRAPHAGEN
Southport, Lincoln County
PIER, RAMP, AND FLOAT SYSTEM
L-24420-4P-A-N (approval)

) NATURAL RESOURCES PROTECTION
) COASTAL WETLAND ALTERATION
) WATER QUALITY CERTIFICATION
)
) FINDINGS OF FACT AND ORDER

Pursuant to the provisions of 38 M.R.S. Sections 480-A et seq. and Section 401 of the Federal Water Pollution Control Act, the Department of Environmental Protection has considered the application of MICHAEL E. TRAPHAGEN AND DIANNE W. TRAPHAGEN with the supportive data, agency review comments, and other related materials on file and FINDS THE FOLLOWING FACTS:

1. PROJECT DESCRIPTION:

A. Summary: The applicants propose to construct a pile-supported pier system that will include a seasonal ramp and a seasonal float. The permanent pier will measure 6 feet wide by 20 feet long and will be located approximately 28 feet south of the northern property line. The pier will be constructed on four pilings and accessed from the water by means of a barge. Pilings will be pinned to ledge or driven as needed. The pier system will also include a 3 foot wide by 40 foot long seasonal ramp and a 10 foot wide by 20 foot long seasonal float. The ramp and float will be constructed off-site. Once the permanent pier is built, the ramp and float will be transported to the project site for installation. The applicants intend to store the ramp and float at an off-site location during the winter months. The applicants currently own a 22 foot long boat and a 39 foot long boat. Both of these vessels require a draft of four feet. The depth of water at mean low water under the proposed float is four feet. The project site is located on the east side of Cameron Point Lane in the Town of Southport.

In addition to the proposed pier, ramp, and float system, the applicants had originally proposed to re-locate 50 linear feet of an intermittent stream in order to construct a 2,000 square foot home, a 1,000 square foot two-story garage, and a small extension of an existing driveway. On July 28, 2009, the applicants withdrew this portion of the proposed project in order to re-consider alternative designs and locations.

B. Current Use of the Site: The site of the proposed project is comprised of 2.07 acres and is currently wooded. It does not contain any existing structures. The lot is bisected by a main road (Cameron Point Lane) which is used to access two other residential lots north of the project site. An existing shared driveway on the northern property line currently provides access to the northern abutting property. The site is referenced in the Town of Southport's tax maps as Lot

#12-3 on Map #25. The deed for the proposed project is indicated in the Lincoln County Registry of Deeds located in Book #2594 on Page #65-67.

2. EXISTING SCENIC, AESTHETIC, RECREATIONAL OR NAVIGATIONAL USES:

In accordance with Chapter 315, Assessing and Mitigating Impacts to Scenic and Aesthetic Uses, the applicant submitted a copy of the Department's Visual Evaluation Field Survey Checklist as Appendix A to the application along with a description of the property and the proposed project. The applicant also submitted several photographs of the proposed project site. Department staff visited the project site on August 27, 2007, October 15, 2007, June 30, 2008, and March 11, 2009.

The proposed pier system is located on Townsend Gut. Townsend Gut is a scenic resource visited by the general public, in part, for the use, observation, enjoyment and appreciation of its natural and cultural visual qualities. Residential structures with associated piers are located on abutting properties. There is also a pier system located across Townsend Gut on a property that contains an existing motel. Further, a strong line of mature forested vegetation visually buffers the project site from southern adjacent properties.

The proposed project was evaluated using the Department's Visual Impact Assessment Matrix and was found to have an acceptable potential visual impact rating. Based on the information submitted in the application, the visual impact rating and the site visits, the Department determined that the location and scale of the proposed activity is compatible with the existing visual quality and landscape characteristics found within the viewshed of the scenic resource in the project area.

The United States Army Corps of Engineers reviewed the proposed project and issued a license (#NAE-2008-3621) for the proposed project on March 5, 2009. Moreover, the Town of Southport conducted a Wharves and Weirs hearing over the proposed project on February 18, 2009. The municipality issued an approval to the proposed project subsequent to this meeting on February 26, 2009.

The Department did not identify any issues involving existing recreational and navigational uses.

While the application was being reviewed, a resident of an abutting residential property became involved in the review process and is an "interested party", as defined in Department Rules, Chapter 2(1)(I), for the purposes of this application review. The interested party asserted that a historic shell midden is located on the southeast corner of the applicants' property. The interested party submitted a report entitled "The Cameron Point Excavation at Southport Island, Maine" which outlines findings of an excavation that was conducted by the Maine Archeological Society in 1956. The interested party stated that a number of artifacts were found during this excavation.

As proposed by the applicants, the proposed pier system will be constructed near the northeast corner of the property. The applicants stated that the shell midden is located on an abutting property. The applicants state that due , the midden will not be disturbed or altered by the construction of or activities associated with the proposed project.

The applicants submitted a letter dated December 10, 2008 from the Maine Historic Preservation Commission (MHPC). In the letter, MHPC concluded that there will be no historic properties affected by the proposed project as defined by Section 106 of the National Historic Preservation Act of 1966. Moreover, the applicants submitted a letter, dated December 27, 2008 from the Tribal Historic Preservation Office of the Passamaquoddy Tribe, which states that the proposed

project will not have an adverse impact on cultural or historical concerns of the tribe. The Penobscot Indian Nation also reviewed the proposed project on November 21, 2008 and stated that the proposed project will not have an impact on a structure or site of historic, architectural, or archaeological significance to the Penobscot Nation as defined by the National Historic Preservation Act of 1966.

The Department considered the comments submitted by the interested party. Based upon information in the record, the site visits, the Visual Impact Assessment, and conclusions made by MHPC, the Passamaquoddy tribe, and the Penobscot Indian Nation, the Department finds that the proposed activity will not unreasonably interfere with existing scenic, aesthetic, recreational or navigational uses of the protected natural resource.

3. SOIL EROSION:

The proposed pier will be constructed from the water by means of a barge. Pilings will be pinned to ledge or driven as needed. The seasonal ramp and float will be constructed at an off-site location and transported to the project site once the permanent pier is built. Based upon review of the application, the Department finds that the activity will not cause unreasonable erosion of soil or sediment nor unreasonably inhibit the natural transfer of soil from the terrestrial to the marine or freshwater environment.

4. HABITAT CONSIDERATIONS:

According to Geographic Information Systems (GIS) mapping software, there are no mapped areas of significant wildlife habitat associated with the proposed project site.

The Maine Department of Inland Fisheries and Wildlife (MDIFW) reviewed the proposed project and confirmed that there are no significant wildlife habitats or inland fishery habitat associated with proposed project site.

The Department of Marine Resources (DMR) stated that the proposed project should not cause any significant adverse impact to marine resources, navigation or recreation. DMR commented that the upland area of the proposed project is currently wooded and undeveloped. The supratidal area is ledge embankment approximately 5 feet high, and the intertidal area is covered with rockweed (*Ascophyllum spp.*) approximately 15 feet wide. DMR noted that rockweed is present and eelgrass (*Zostera marina*) is absent.

Based upon comments provided by MDIFW and DMR, the Department finds that the activity will not unreasonably harm any significant wildlife habitat, freshwater wetland plant habitat, threatened or endangered plant habitat, aquatic or adjacent upland habitat, travel corridor, freshwater, estuarine or marine fisheries or other aquatic life.

5. WATER QUALITY CONSIDERATIONS:

The applicant intends to use lumber treated with chromated copper arsenate (CCA) to construct the pier. To protect water quality, all CCA treated lumber must be cured on dry land in a manner that exposes all surfaces to the air for 21 days prior to the start of construction. Provided the CCA treated lumber is cured as described above, the Department finds that the proposed project will not violate any state water quality law.

6. WETLANDS AND WATERBODIES PROTECTION RULES:

In order to construct a pile supported pier with a seasonal ramp and float, the applicant proposes to directly alter 4 square feet of intertidal area; there is no anticipated direct impact to the subtidal area. The proposed project will indirectly alter 84 square feet of intertidal area and 320 square feet of subtidal area. Additionally, the proposed pier will indirectly alter 36 square feet of upland area above the highest annual tide line.

The interested party asserted without documentation that the proposed pier, ramp, and float are sited within 30 feet of an existing stream. For this reason, the interested party contends that the proposed project violates regulatory setbacks from protected natural resources. The applicants submitted a site plan, entitled "Traphagen Parcel", prepared by Knickerbocker Design Company, dated November 6, 2008 with the latest revision date being February 25, 2009. The survey indicates that the proposed project site is approximately 250 feet north of the outlet of the stream.

The Department considered the comments submitted by the interested party. The Department finds the applicants' survey to be credible and finds that the proposed project will not be sited within 75 feet of the outlet of the existing stream, which is the setback for protected natural resources pursuant to the Department's Permit By Rule Standards, Chapter 305.

The Department's Wetlands and Waterbodies Protection Rules, Chapter 310, require that the applicants meet the following standards:

A. Avoidance. No activity may be permitted if there is a practicable alternative to the project that would be less damaging to the environment. Each application for a Natural Resources Protection Act permit must provide an analysis of alternatives in order to demonstrate that a practicable alternative does not exist. The applicant submitted an alternative analysis for the proposed project completed by Stockwell Environmental Consulting and dated November 12, 2008. The applicants considered the following options as alternatives to the proposed project:

- The applicants investigated the use of nearby boat launching facilities and marinas. The only public pier is on Southport Island and is known as the Newagen Town Landing. There is no boat launch at this facility. Further, there is a waiting list of several years for moorings in Townsend Gut. The Town of Southport has recently bought a parcel in Cozy Harbor and the construction of facilities, such as a pier, are currently being considered by the municipality. The waiting list for Cozy Harbor is over 10 years. A boatyard is present in the Town of Southport, known as the Boothbay Region Boatyard. However, the applicants stated that this facility is considerably costly. Due to the restrictions presented by these locations, the applicants determined that these alternatives were not feasible.
- The applicants acknowledged that they have a pier on property that they own in the Town of Boothbay. However, the applicants wish to have access to the resource on the site of the proposed project.

B. Minimal Alteration. The amount of wetland to be altered must be kept to the minimum amount necessary for meeting the overall purpose of the project. The applicants intend to utilize the point of frontage on the property that extends the furthest into the resource on which to construct the proposed pier system. Further south of the project site, the rocky shoreline becomes mudflat. The proposed location of the pier system avoids the mudflat and the outlet of an intermittent stream. The applicants also stated that if the proposed project had been sited at this location, the overall pier system would have needed to be longer to access the intertidal area.

Impacts to the coastal wetland would have been greater if the proposed project were sited at this location.

C. Compensation. In accordance with Chapter 310 Section 5(C), the goal of compensation is to achieve no net loss of wetland functions and values. The applicants do not propose to alter or fill 500 square feet or more of intertidal or subtidal area, which is the threshold over which compensation is generally required. Further, the proposed project will not have an adverse impact on marine resources or wildlife habitat as determined by DMR and MDIFW. Due to these facts, the Department determined that compensation is not required.

The Department finds that the applicants have avoided and minimized wetland impacts to the greatest extent practicable, and that the proposed project represents the least environmentally damaging alternative that meets the overall purpose of the project.

7. OTHER CONSIDERATIONS:

The Department did not identify any other issues involving existing scenic, aesthetic, or navigational uses, soil erosion, habitat or fisheries, the natural transfer of soil, natural flow of water, water quality, or flooding.

BASED on the above findings of fact, and subject to the conditions listed below, the Department makes the following conclusions pursuant to 38 M.R.S.A. Sections 480-A et seq. and Section 401 of the Federal Water Pollution Control Act:

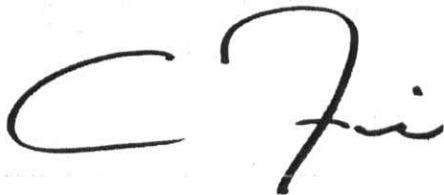
- A. The proposed activity will not unreasonably interfere with existing scenic, aesthetic, recreational, or navigational uses.
- B. The proposed activity will not cause unreasonable erosion of soil or sediment.
- C. The proposed activity will not unreasonably inhibit the natural transfer of soil from the terrestrial to the marine or freshwater environment.
- D. The proposed activity will not unreasonably harm any significant wildlife habitat, freshwater wetland plant habitat, threatened or endangered plant habitat, aquatic or adjacent upland habitat, travel corridor, freshwater, estuarine, or marine fisheries or other aquatic life.
- E. The proposed activity will not unreasonably interfere with the natural flow of any surface or subsurface waters.
- F. The proposed activity will not violate any state water quality law including those governing the classifications of the State's waters provided CCA treated lumber is cured as described in Finding 5.
- G. The proposed activity will not unreasonably cause or increase the flooding of the alteration area or adjacent properties.
- H. The proposed activity is not on or adjacent to a sand dune.
- I. The proposed activity is not on an outstanding river segment as noted in Title 38 M.R.S.A. Section 480-P.

THEREFORE, the Department APPROVES the above noted application of MICHAEL E. TRAPHAGEN AND DIANNE W. TRAPHAGEN to construct a pile-supported pier with a seasonal ramp and float, SUBJECT TO THE ATTACHED CONDITIONS, and all applicable standards and regulations:

1. Standard Conditions of Approval, a copy attached.
2. The applicant shall take all necessary measures to ensure that their activities or those of their agent do not result in measurable erosion of soil on the site during the construction of the project covered by this approval.
3. Severability. The invalidity or unenforceability of any provision, or part thereof, of this License shall not affect the remainder of the provision or any other provisions. This License shall be construed and enforced in all respects as if such invalid or unenforceable provision or part thereof had been omitted.
4. All CCA treated lumber shall be cured on dry land in a manner that exposes all surfaces to the air for 21 days prior to the start of construction.

THIS APPROVAL DOES NOT CONSTITUTE OR SUBSTITUTE FOR ANY OTHER REQUIRED STATE, FEDERAL OR LOCAL APPROVALS NOR DOES IT VERIFY COMPLIANCE WITH ANY APPLICABLE SHORELAND ZONING ORDINANCES.

DEPARTMENT OF ENVIRONMENTAL PROTECTION



This permit has been digitally signed by Andrew C. Fisk on behalf of Commissioner David P. Littell. It is digitally signed pursuant to authority under 10 M. R.S.A. § 9418. It has been filed with the Board of Environmental Protection as of the signature date 2009.08.27 14:39:15 -04'00'

PLEASE NOTE THE ATTACHED SHEET FOR GUIDANCE ON APPEAL PROCEDURES

bc/ats#69096/l24420an



Natural Resource Protection Act (NRPA) Standard Conditions

THE FOLLOWING STANDARD CONDITIONS SHALL APPLY TO ALL PERMITS GRANTED UNDER THE NATURAL RESOURCE PROTECTION ACT, TITLE 38, M.R.S.A. SECTION 480-A ET.SEQ. UNLESS OTHERWISE SPECIFICALLY STATED IN THE PERMIT.

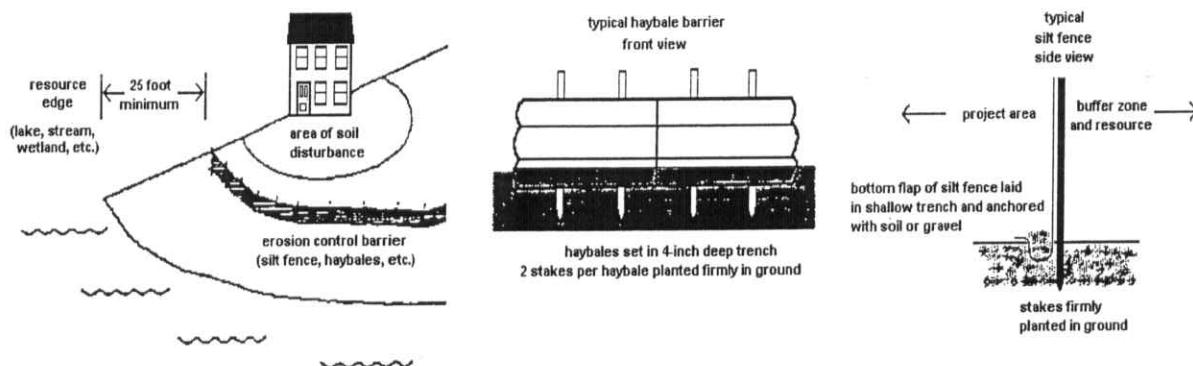
- A. Approval of Variations From Plans. The granting of this permit is dependent upon and limited to the proposals and plans contained in the application and supporting documents submitted and affirmed to by the applicant. Any variation from these plans, proposals, and supporting documents is subject to review and approval prior to implementation.
- B. Compliance With All Applicable Laws. The applicant shall secure and comply with all applicable federal, state, and local licenses, permits, authorizations, conditions, agreements, and orders prior to or during construction and operation, as appropriate.
- C. Erosion Control. The applicant shall take all necessary measures to ensure that his activities or those of his agents do not result in measurable erosion of soils on the site during the construction and operation of the project covered by this Approval.
- D. Compliance With Conditions. Should the project be found, at any time, not to be in compliance with any of the Conditions of this Approval, or should the applicant construct or operate this development in any way other the specified in the Application or Supporting Documents, as modified by the Conditions of this Approval, then the terms of this Approval shall be considered to have been violated.
- E. Initiation of Activity Within Two Years. If construction or operation of the activity is not begun within two years, this permit shall lapse and the applicant shall reapply to the Board for a new permit. The applicant may not begin construction or operation of the activity until a new permit is granted. Reapplications for permits shall state the reasons why the applicant will be able to begin the activity within two years form the granting of a new permit, if so granted. Reapplications for permits may include information submitted in the initial application by reference.
- F. Reexamination After Five Years. If the approved activity is not completed within five years from the date of the granting of a permit, the Board may reexamine its permit approval and impose additional terms or conditions to respond to significant changes in circumstances which may have occurred during the five-year period.
- G. No Construction Equipment Below High Water. No construction equipment used in the undertaking of an approved activity is allowed below the mean high water line unless otherwise specified by this permit.
- H. Permit Included In Contract Bids. A copy of this permit must be included in or attached to all contract bid specifications for the approved activity.
- I. Permit Shown To Contractor. Work done by a contractor pursuant to this permit shall not begin before the contractor has been shown by the applicant a copy of this permit.

DEPARTMENT OF ENVIRONMENTAL PROTECTION

Erosion Control for Homeowners

Before Construction

1. If you have hired a contractor, make sure you discuss your permit-by-rule with them. Talk about what measures they plan to take to control erosion. Everybody involved should understand what the resource is, and where it is located. Most people can identify the edge of a lake or river. However, the edges of wetlands are often not so obvious. Your contractor may be the person actually pushing dirt around, but you are both responsible for complying with the permit-by-rule.
2. Call around to find where erosion control materials are available. Chances are your contractor has these materials already on hand. You probably will need silt fence, hay bales, wooden stakes, grass seed (or conservation mix), and perhaps filter fabric. Places to check for these items include farm & feed supply stores, garden & lawn suppliers, and landscaping companies. It is not always easy to find hay or straw during late winter and early spring. It also may be more expensive during those times of year. Plan ahead -- buy a supply early and keep it under a tarp.
3. Before any soil is disturbed, make sure an erosion control barrier has been installed. The barrier can be either a silt fence, a row of staked hay bales, or both. Use the drawings below as a guide for correct installation and placement. The barrier should be placed as close as possible to the soil-disturbance activity.
4. If a contractor is installing the erosion control barrier, double check it as a precaution. Erosion control barriers should be installed "on the contour", meaning at the same level or elevation across the land slope, whenever possible. This keeps stormwater from flowing to the lowest point along the barrier where it can build up and overflow or destroy the barrier.



During Construction

1. Use lots of hay or straw mulch on disturbed soil. The idea behind mulch is to prevent rain from striking the soil directly. It is the force of raindrops hitting the bare ground that makes the soil begin to move downslope with the runoff water, and cause erosion. More than 90% of erosion is prevented by keeping the soil covered.
2. Inspect your erosion control barriers frequently. This is especially important after a rainfall. If there is muddy water leaving the project site, then your erosion controls are not working as intended. You or your contractor then need to figure out what can be done to prevent more soil from getting past the barrier.
3. Keep your erosion control barrier up and maintained until you get a good and healthy growth of grass and the area is permanently stabilized.